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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
MCI Telecommunications Corporation	)	CC Docket No. 96-149
	)	
Petition for Declaratory Ruling Regarding the Joint Marketing Restriction in Section 271(e)(1) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996	)	

To: The Commission

BELLSOUTH COMMENTS

BELLSOUTH CORPORATION

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June 9, 1997

SUMMARY

Under Section 271(e)(1) of the Communications Act, the ability of certain IXCs to market interLATA services jointly with BOC services purchased for resale is restricted until the BOC is authorized to provide interLATA service in the same territory. Congress adopted the joint marketing restriction in section 271(e) in order to limit the ability of covered IXCs like MCI to provide "one-stop-shopping" for certain services until the BOC can compete on equal footing. Because the MCI marketing materials convey the appearance of "one-stop shopping" prior to BOC entry into the interLATA market, the Commission should find the materials to be contrary to Section 271(e)(1) and the *Non-Accounting Safeguards Order*.

Specifically, when a well-known long-distance company like MCI uses the expression "One company . . . one bill . . . one call" in materials promoting its local service to consumers, at the same time as it claims to regulators that it is *not* engaged in joint marketing, it is deceiving both consumers and regulators. MCI's advertisements mislead the public by giving the clear impression that MCI may offer bundled packages of interLATA service and local service, and MCI attempts to mislead the Commission by claiming that this is not a prohibited bundled offering. For MCI, the bundling of local and interLATA service is clearly prohibited by Section 271(e)(1) and the Commission's *Non-Accounting Safeguards Order* until the BOCs are allowed to compete in the long distance market in the state in question where MCI is disseminating these materials.

Although MCI claims that it has First Amendment concerns relating to the joint marketing restriction in Section 271(e)(1), MCI's First Amendment concerns pale in comparison to the First Amendment concerns of BOCs in their provision of electronic publishing. Because BOCs are outright prohibited from speaking via electronic publishing by virtue of Section 274(e) — there is not just a restriction on the manner in which they may express themselves as is the case with the IXCs under Section 271(e)(1) — the First Amendment concerns disproportionately hit the BOCs harder than the IXCs. Given the constitutional imperative of even-handed regulation of speech, so as not to discriminate in favor of some speakers and against others, MCI's argument for a narrow construction of the joint marketing restriction in Section 271(e) cannot stand.

Finally, BellSouth notes that the competitive harm done to the BOCs who compete with MCI in the markets where it is now illegally joint marketing local and long distance service has already been done. While this harm cannot be undone, further harm can be mitigated if the Commission takes swift and sure action in response to the MCI petition to state with certitude that the marketing materials utilized by MCI are contrary to Section 271(e)(1) and the *Non-Accounting Safeguards Order*.

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To: The Commission

BELLSOUTH COMMENTS

BellSouth Corporation ("BellSouth"), on behalf of its subsidiaries and affiliates, hereby submits these comments in response to the Petition for Declaratory Ruling filed by MCI Telecommunications Corporation ("MCI") in CC Docket 96-149 on May 1, 1997 (hereinafter "MCI Petition") regarding the joint marketing restriction in Section 271(e)(1) of the Communications Act, as amended. For the reasons stated herein, BellSouth believes the Commission should find the marketing materials submitted by MCI to be contrary to Section 271(e)(1)[1] and the Commission's *First Report and Order*[2] in this proceeding.

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[1] 47 U.S.C. § 271(e)(1).

[2] *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, *First Report and Order and Further Notice of Proposed Rulemaking*, FCC 96-489 (rel. Dec. 24, 1996) ("*Non-Accounting Safeguards Order*"), *petitions for recon. pending.*

BACKGROUND

Under Section 271(e)(1) of the Communications Act, as amended, the ability of certain interexchange carriers to market interLATA services jointly with Bell Operating Company ("BOC") local services purchased for resale is restricted until certain conditions have been met. Specifically, the statute states that:

> Until a Bell operating company is authorized . . . to provide interLATA services in an in-region State, or until 36 months have passed since the date of enactment of the Telecommunications Act of 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) with interLATA services offered by that telecommunications carrier.[3]

Thus, covered interexchange carriers ("IXCs"), including MCI, are prohibited from jointly marketing their long distance services together with BOC local exchange services purchased for resale until the earlier of February 8, 1999 or the date when a BOC is allowed to enter the long distance market in a given state.[4]

As recognized by the Commission, Congress adopted the joint marketing restriction in section 271(e) in order to limit the ability of covered IXCs like MCI to provide "one-stop-shopping" for certain services until the BOC is authorized to provide interLATA service in the same territory.[5] Thus, bundling by a covered IXC of resold BOC local services and interLATA services into a package that can be sold in a single transaction is prohibited under Section 271(e)(1) prior to BOC entry into the long-distance market.[6] The Commission also found that Section 271(e) bars covered

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3 47 U.S.C. § 271(e)(1).

4 *Non-Accounting Safeguards Order* at ¶ 277.

5 *Id.*

6 *Id.*

IXCs from marketing interLATA services and BOC resold local services to consumers through a single transaction or by a single agent in the context of one communication.[7]

In the advertising context, the Commission addressed whether a covered IXC should be prohibited from claiming in a single advertisement that it offers both interLATA services and local services in instances where the carrier intends to furnish the latter through BOC resold local services, which it is authorized to market only on a stand-alone basis.[8] The Commission expressed concern that the promotion of both services in a single advertisement may suggest to consumers that the services are available jointly as a package when legally they are not under Section 271(e)(1). Accordingly, the Commission held that the First Amendment does not confer the right to deceive the public.[9] Specifically, the Commission concluded that:

> [A] covered interexchange carrier may advertise the availability of interLATA services and BOC resold local services in a single advertisement, but such carrier *may not mislead the public by stating or implying that it may offer bundled packages of interLATA service and BOC resold service, or that it can provide "one-stop shopping" of both services through a single transaction.* . . . [B]oth activities are prohibited under section 271(e).[10]

DISCUSSION

BellSouth agrees with the Commission that Section 271(e)(1) prohibits covered IXCs like MCI from jointly marketing their long distance services together with resold BOC local exchange services until the BOC is allowed to enter the long distance market in a given state. Congress

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[7] *Id.* at ¶ 278. According to the Commission, "such a restriction is an essential element of the joint marketing prohibition in section 271(e) during the period the limitation remains in effect." *Id.*

[8] *Id.* at ¶ 280.

[9] *See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1505 n.7, 1506 (1996) (emphasizing that the First Amendment does not prevent the government from regulating commercial speech in a manner calculated to prevent deception).

[10] *Non-Accounting Safeguards Order* at ¶ 280 (emphasis added).

imposed this restriction to provide parity between the BOCs and the IXCs in their ability to offer "one stop shopping."[11] BellSouth would interpret the restrictions in Section 271(e)(1) as applied to IXC joint offerings more expansively than the Commission to prohibit even advertising the availability of interLATA services combined with local exchange services, making these services available from a single source, or providing bundling discounts for the purchase of both services. BellSouth has previously shown that these are all forms of joint marketing which Congress sought to prohibit prior to BOC entry into the long-distance market in order to ensure parity between the IXCs and the BOCs.[12]

Nevertheless, the marketing materials which MCI seeks to use fail to pass muster even under the Commission's stated view of Section 271(e)(1). As discussed below, there can be no doubt that the MCI marketing materials "contraven[e] the letter and spirit of the congressional prohibition on joint marketing *by conveying the appearance of 'one-stop shopping'* [for] BOC resold local services and interLATA services to potential customers."[13]

I. MCI'S MARKETING MATERIALS ARE CONTRARY TO SECTION 271(E)(1) OF THE COMMUNICATIONS ACT, THE INTENT OF CONGRESS, AND THE *NON-ACCOUNTING SAFEGUARDS ORDER*

MCI's describes its first advertisement, submitted as Exhibit A to its petition, as "promis[ing], to those current long distance customers who also sign up for resold local service, joint customer care — 'one call to one company for customer service' and 'one easy-to-read monthly

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11 *See* S. Rep. No. 23, 104th Cong., 1st Sess. 43 (1995) ("Senate Report").

12 *See* BellSouth Comments in CC Docket No. 96-149 at 11-12 (filed Aug. 15, 1996); *see also* BellSouth Reply Comments at 6-11 (filed Aug. 30, 1997); BellSouth Petition for Reconsideration at 7-10 (filed Feb. 20, 1997); BellSouth Opposition/Comments at 6-8, 9-10 (filed Apr. 2, 1997); BellSouth Reply at 8-10 (filed Apr. 16, 1997).

13 *Non-Accounting Safeguards Order* at ¶ 282 (emphasis added).

statement for both your local and long distance calls.'"[14] The second advertisement included as part of Exhibit A bundles MCI's "Friends and Family" long distance service with local service. Both of these advertisements are the subject of a complaint filed by Pacific Bell with the California Public Utilities Commission ("CPUC").[15] The Pacific Bell CPUC complaint also includes another advertisement, included in the MCI petition as Exhibit B, which promises to existing MCI long-distance customers "One company . . . one bill . . . one call."[16]

These advertisements clearly contravene the Section 271(e)(1) restriction against joint marketing by conveying the appearance of one-stop shopping for local and interLATA service to potential customers at a time when MCI is not permitted to offer one-stop shopping. When MCI, a well-known long-distance company, uses the expression "One company . . . one bill . . . one call" in materials promoting its local service to consumers, at the same time as it claims to regulators that it is *not* engaged in joint marketing, it is attempting to mislead both consumers and regulators. Such advertisements mislead the public by giving the clear impression that MCI may offer bundled packages of interLATA service and local service, and MCI attempts to mislead the Commission by claiming that this is not a prohibited bundled offering. For MCI, the bundling of local and

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[14] MCI Petition at 8 (quoting Exhibit A). With regard to this first advertisement, MCI has clearly identified that its local phone service is "resold" local phone service, which the Commission has recognized cannot be jointly marketed with long distance service under Section 271(e)(1). *Id.; see also Non-Accounting Safeguards Order* at ¶ 276. MCI has not claimed that any of its other marketing materials referencing local phone service will use anything other than BOC resold local phone service. BellSouth submits that if MCI seeks to argue that its local phone service is being provided over its own facilities, through the use of unbundled network elements, or by reselling local exchange services purchased from a local exchange carrier that is not a BOC, then it must make an affirmative showing to that effect.

[15] *Pacific Bell (U 1001 C) v. AT&T Communications of California, Inc. (U 5002 C) and MCI Telecommunications Corporation (U 5001 C)*, Case No. 97-03-016 (filed Mar. 12, 1997; amended Apr. 25, 1997).

[16] *See* MCI Petition at 8 & Exhibit B.

interLATA service is clearly prohibited by Section 271(e)(1) and the Commission's *Non-Accounting Safeguards Order*.[17] Moreover, these advertisements contravene the Commission's conclusion regarding the advertising of joint customer care,[18] which can take place only after customers "have ordered *both* services," and not while a subscriber to long-distance service is being solicited to subscribe to local service.[19]

Similarly, MCI's mailings attached as Exhibit C include solicitations used by MCI to promote its local service offerings to its existing long distance customers. For example, one letter in Exhibit C states that "the company you rely on for . . . long distance . . . is pleased to offer you a new simple alternative for local calling." The letter also promotes "[o]ne call for all your Customer Service needs," "[o]ne easy-to-read phone bill to pay each month," and "[o]ne company to consult for all of your communications."[20] Like the advertisements in Exhibits A and B, this letter clearly implies "one-stop shopping" at a time when MCI is barred from joint marketing. The terms "one call," "one bill," and "one company" all lead to the conclusion that there is "one place" to go for your local and long distance phone needs: MCI. These references clearly constitute the promotion of joint "customer care," which the Commission has held to be impermissible until after the customer subscribes to both local and long-distance services.[21]

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17 *See Non-Accounting Safeguards Order* at ¶¶ 280, 282.

18 Customer care is defined by the Commission as "a single bill for both BOC resold local services and interLATA services, and a single point-of-contact for maintenance and repairs." *Non-Accounting Safeguards Order* at ¶ 281.

19 *Id.* at ¶ 281 ("We agree . . . that, after a potential customer subscribes to both interLATA and BOC resold local services from a covered interexchange carrier, that carrier should be permitted to provide joint 'customer care'").

20 *See* MCI Petition, Exhibit C.

21 *Non-Accounting Safeguards Order* at ¶ 281.

This premature joint marketing is expressly prohibited under Section 271(e)(1) until the BOCs are allowed to compete in the long distance market in the state in question where MCI is disseminating these materials. The reason for this is simple: as stated above, Congress intended for there to be parity among the BOCs and the major IXCs with respect to their ability to offer one-stop shopping.[22] Congress did not intend to shackle one competitor while giving the other free rein; rather, it sought to allow both the BOCs and the IXCs to compete for customers who want a single point of contact for all their telecommunications needs, *but only after both entities are allowed to compete in each other's markets.* What MCI is doing now — illegally jointly marketing interLATA service with resold BOC local service — BellSouth is foreclosed from doing under Section 272(g)(2)[23] until it is authorized to provide interLATA services. MCI's actions thus place BellSouth and the other BOCs at a competitive disadvantage contrary to the parity that Congress sought to establish and maintain.

Moreover, the letters found in Exhibit C, as well as Exhibit D,[24] are less in the nature of advertisements and more in the nature of solicitations by a single MCI customer service representative through a single transaction. The Commission defined a "single transaction" as "the use of the same sales agent to market both products [interLATA services and BOC resold local services] to the same customer during a single communication."[25] The Commission has concluded unequivocally that the use of *the same sales agent* to market both interLATA services and BOC

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22 Senate Report at 43.

23 47 U.S.C. § 272(g)(2).

24 Exhibit D includes a letter to a non-MCI long distance customer, which states: "Here's some exciting news regarding your local telephone service from MCI — the company that provides savings and convenience to millions of long distance customers! MCI is pleased to offer you a new simple alternative for local calling." *See* MCI Petition, Exhibit D.

25 *Non-Accounting Safeguards Order* at ¶ 278.

resold local services *during a single communication* is prohibited under Section 271(e)(1).[26] Here, each letter constitutes a single communication using the same sales agent ("Robert Rep, MCI Customer Service") to market both interLATA services and BOC resold local services (the letters state "when you choose MCI for both local and long distance service"). These actions are clearly contrary to Section 271(e)(1).[27]

Moreover, BellSouth notes that the marketing materials submitted by MCI along with its petition are not the only materials being used by MCI in violation of Section 271(e)(1). In addition to the CPUC complaint of Pacific Bell referenced above, Ameritech has filed both a formal and an informal complaint with the FCC alleging further violations of Section 271(e)(1).[28] BellSouth has reviewed the MCI materials which are the subject of these complaints and agrees with Ameritech that they are prohibited efforts to joint market in contravention of Section 271(e)(1). These materials include an advertisement which states "Complete Telecommunications Bundling. Only from MCI." The joint marketing ad also announces that "volume discounts based on total spending" are available for such services as local phone service, long distance, data, conferencing, cellular, paging and internet, and claimed that MCI can provide local phone service and long distance "through 'one contract.'"[29] Again, the essence of these materials is to state that MCI "may offer bundled packages of interLATA service and BOC resold service" and that it "can provide 'one-stop

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[26] *Id.*

[27] *Id.*

[28] *See Ameritech Corporation v. MCI Telecommunications Corporation*, File No. E-97-17 (filed Apr. 8, 1997; amended May 2, 1997) ("Ameritech Formal Complaint"); Notice of Informal Complaint, *Ameritech*, IC-97-00440 (Nov. 26, 1996).

[29] Ameritech Formal Complaint at 4 & Exhibit 1.

shopping'" for both services. The Commission has expressly stated that a covered IXC, such as MCI, may not do this under Section 271(e)(1).[30]

II. THE FIRST AMENDMENT CONCERNS OF MCI PALE IN COMPARISON TO THE FIRST AMENDMENT CONCERNS OF BOCS IN THEIR PROVISION OF ELECTRONIC PUBLISHING

MCI claims that it has First Amendment concerns relating to the joint marketing restriction in Section 271(e)(1) in that it cannot jointly market local and long distance service. Specifically, MCI states that none of its marketing materials "could constitutionally be found to violate Section 271(e)(1), given the First Amendment requirement, as recognized in the *Non-Accounting Safeguards Order*, to construe any such restrictions on speech narrowly."[31] Accordingly, MCI argues that the Commission must construe Section 271(e)(1) and the *Non-Accounting Safeguards Order* "in a manner that does not infringe upon MCI's or other carriers' constitutional rights."[32] These First Amendment concerns of MCI, however, pale in comparison to the First Amendment concerns of BOCs in their provision of electronic publishing.

Specifically, under Section 274(e), a BOC is prohibited from engaging in joint marketing of any promotion, marketing, sales or advertising with its separate electronic publishing affiliate, with limited exceptions.[33] Because BOCs are outright prohibited from speaking via electronic publishing by virtue of Section 274 — there is not just a restriction on the manner in which they may express themselves as is the case with the IXCs under Section 271(e)(1) — the First Amendment concerns disproportionately hit the BOCs harder than the IXCs. As noted by the Supreme Court, "[A] law

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30 *Non-Accounting Safeguards Order* at ¶ 280; *see id.* at ¶ 282.

31 MCI Petition at 8-9.

32 *Id.* at 9.

33 47 U.S.C. § 274(c).

or policy permitting communication in a certain manner for some *but not for others* raises the specter of content and viewpoint censorship."[34]

Given the constitutional imperative of even-handed regulation of speech, so as not to discriminate in favor of some speakers and against others, MCI's argument for a "narrow[]" construction of the joint marketing restriction in Section 271(e) cannot stand. The restrictions on MCI's speech must be construed broadly so as to preserve some degree of balance with respect to the restraint on BOC speech. BOCs are subject to a complete ban on joint marketing of local and long distance service until their Section 271 applications are approved,[35] and they are barred outright from joint marketing telephone and electronic publishing service by Section 274.[36] Thus, the BOCs' First Amendment concerns outweigh any such concerns expressed by MCI. To interpret Section 271(e) as MCI suggests would tilt the balance too far in favor of MCI and would violate, not only congressional intent, but also the First Amendment by "permitting communication in certain manner for some but not for others."[37] The Commission clearly may regulate MCI's speech to the extent necessary to prevent MCI from misleading consumers.[38]

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[34] *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 763 (1988) (emphasis added).

[35] *See* 47 U.S.C. § 272(g).

[36] BellSouth notes that complete bans by government concerning the marketing of lawful products and services are highly suspect and are subject to searching review. *See 44 Liquormart, Inc. v. Rhode Island,* 116 S.Ct. 1495, 1507-08 (1996); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 566 (1980); *Linmark Associates, Inc. v. Willingboro,* 431 U.S. 85, 96-97 (1977).

[37] *City of Lakewood,* 486 U.S. at 763.

[38] *44 Liquormart,* 116 S.Ct. at 1505-06 & n.7.

III. THE COMMISSION MUST TAKE SWIFT AND SURE ACTION TO PREVENT CONTINUED USE OF MCI'S ANTICOMPETITIVE MARKETING MATERIALS

Finally, BellSouth notes that the competitive harm done to the BOCs who compete with MCI in the markets where it is now illegally joint marketing local and long distance service has already been done. While this harm cannot be undone, further harm can be mitigated if the Commission takes swift and sure action in response to the MCI petition to state with certitude that the marketing materials utilized by MCI are contrary to Section 271(e)(1) of the Communications Act and the *Non-Accounting Safeguards Order*, for the reasons stated herein. Such action is necessary to achieve the regulatory parity among the BOCs and the major IXCs which Congress sought to establish in the marketing provisions of Section 272(g) and 271(e) with respect to their ability to offer one-stop shopping.[39]

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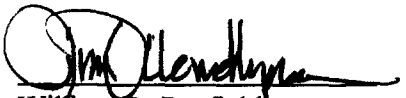
[39] *See* Senate Report at 43.

CONCLUSION

For the foregoing reasons, BellSouth urges the Commission to find the marketing materials submitted by MCI to be contrary to Section 271(e)(1) and the Commission's *Non-Accounting Safeguards Order*. These materials are unambiguous in both suggesting that MCI may and does offer bundled packages of interLATA and resold BOC local service, and promoting joint customer care for these services when MCI is not allowed to engage in joint marketing under Section 271(e)(1). Accordingly, MCI's request for declaratory ruling cannot be granted. Instead, the Commission must act swiftly to declare that MCI's marketing materials violate Section 271(e)(1) and may not be used until the earlier of February 8, 1999 or the date when a BOC is allowed to enter the long distance market in a given state, as required by Section 271(e)(1) of the Communications Act, as amended.

Respectfully submitted,

BELLSOUTH CORPORATION

By: 

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CERTIFICATE OF SERVICE

I, Crystal Clay, do hereby certify that copies of the foregoing "BellSouth Comments" in response to MCI's "Petition for Declaratory Ruling" in CC Docket No. 96-149 were served by U.S. mail on this 9th day of June 1997, to the persons listed below:

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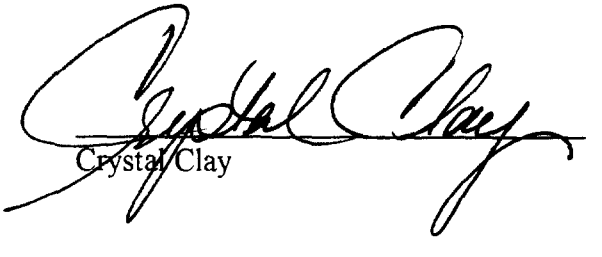

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